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SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 327

JOSEPH G. WILSON

Petitioner

versus

OIL TRANSPORT COMPANY, INC.

Respondent

On certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

EBERHARD P. DEUTSCH
Hibernia Bank Building
New Orleans 12, Louisiana
Attorney for Respondent

DEUTSCH, KERRIGAN & STILES
BRUNSWICK G. DEUTSCH
PAUL A. GAUDET
Of Counsel

QUESTION PRESENTED

The only appellate question raised in the instant case was whether the record contains evidence from which the jury could properly infer (as it did) that an adequate lookout was in fact maintained. This question was resolved in the affirmative.

There is accordingly no occasion to consider any question as to the correct rule to be applied in the absence of a proper lookout.

The case therefore presents no question appropriate for review by this court.

STATEMENT OF THE CASE

To avoid collision with an on-coming tow "hogging the center of the channel"[1] in the Intracoastal Waterway, the pilot of respondent's Tug *Suwannee* maneuvered his tug and tow into the bank, where the *Suwannee* sank.

Petitioner, a member of the *Suwannee's* crew, asserted that he was injured in escaping to the safety of one of the barges; and that the accident was caused by inadequacy of the *Suwannee's* lookout. The jury found for respondent, and the Court of Appeals affirmed.

[1] 242 F2d 727, 729; petitioner's brief, p. 17.

ARGUMENT

The burden of the petition for certiorari is that the courts below erroneously refused to apply to the case the Rule of *The Pennsylvania* that a statutory fault places on the offending party the burden of proving that the violation could not have contributed to the accident.

But before this rule can apply, a statutory violation must be shown. The only statutory fault claimed by petitioner is inadequacy of lookout.

The question of adequacy of lookout is one of fact.[2]

Petitioner requested charges that "it was the duty of the defendant . . . to maintain aboard the Tug *Suwannee*, and her tow a proper lookout" and that if the defendant "was guilty of any breach of the rules regarding . . . proper lookout" a verdict should be returned in favor of plaintiff."[3]

These charges were given by the district judge verbatim as requested by petitioner;[4] and, as stated, the jury found for respondent.

The case accordingly presents no question as to any rule to be applied in the absence of a proper lookout.

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[2] 33 USC 221 does not specify any requirements for the lookout other than that it be "adequate". "The wording of the rule itself . . . clearly reveal(s) that a separate and independent lookout aboard a tug or the lead barge of its forward tow are not inexorable requirements of prudent tug navigation. . . . The question of competency of a lookout in any instance is primarily one of fact, to be realistically resolved under all of the circumstances". Parker Bros. & Co. vs DeForrest, 221 F2d 377, 380 (CA 5-1955). See also The Blue Jacket, 144 US 371, 389 (1892); Koch-Ellis vs Chemical Barge Lines, 224 F2d 115 (CA 5-1955); Compania De Maderas, etc. vs The Queenston Heights, 220 F2d 120 (CA 5-1955); Petrich vs Hansen, 201 F2d 261, 263 (CA 5-1953).

[3] R. 322.

[4] R. 300.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

EBERHARD P. DEUTSCH
Attorney for Respondent

DEUTSCH, KERRIGAN & STILES
BRUNSWICK G. DEUTSCH
PAUL A. GAUDET
Of Counsel

August, 1957